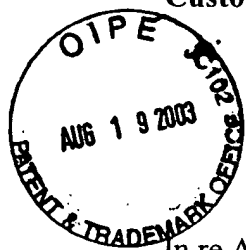


Customer No. 30223



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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Appeal Brief
PATENT
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Cofor
8-27-03

In re Application of:

Bruce H. Prince

Serial No. 09/818,347

Filed: March 27, 2001

Title: CARPENTER BEE TRAP

) Attorney Docket No. 52372-00002USPT

) Group Art No. 3644

) Examiner: Susan C. Alimenti

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APPEAL BRIEF PURSUANT TO 37 C.F. R. §§ 1.191 AND 1.192

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To the Commissioner for Patents:

This appeal brief is filed pursuant to Applicant's appeal to the Board of Patent Appeals and Interferences from the final rejection of claims 1-20 in an Office Action dated February 10, 2003, for the above-listed application. The Notice of Appeal was filed on June 9, 2003.

In accordance with 37 C.F.R. § 1.192 (a), this brief is being submitted in triplicate.

1. REAL PARTY IN INTEREST

The real party in interest is Bruce Prince residing at 1352 Upper Grandview Road, Jasper, Georgia 30143.

2. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

3. STATUS OF CLAIMS

Claims 1-20 are currently pending in the above-referenced application. Claims 1-20 are the claims subject to this appeal. A copy of claims 1-20 is contained in the attached Appendix of Appealed Claims 1-20.

Claims 1, 2, 4 and 5 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Ritchey U.S. Patent No. 5,493,997.

Claim 3 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ritchey and Schneidmiller U.S. Patent 4,551,941.

Claim 6 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ritchey and Rimback U.S. Patent 5,685,109.

Claim 7 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ritchey.

Claims 8-13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ritchey and Schneidmiller.

Claims 14-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Rimback and Schneidmiller.

4. STATUS OF AMENDMENTS

No amendments to the claims were made after the Final Rejection dated February 10, 2003.

5. SUMMARY OF THE INVENTION

The present invention is directed to a baitless carpenter bee trap comprising a housing having a hollow interior and at least one solid wall having a hole formed therein to permit carpenter bees to enter the hollow interior of the housing, the hole having about the same size as holes normally made by carpenter bees so that the hole tends to attract such bees. The preferred hole size is in the range from about 5/16 inch to about 1/2 inch. The exterior surface of the solid

wall around the hole preferably has a light color, and the walls of the housing preferably form only a single hole and are opaque so that the hole appears dark from outside the housing. The interior surface of the solid wall forming the interior edge of the hole is preferably substantially flat. In a particularly preferred embodiment, the trap is made of a single piece of molded plastic with molded hinges connecting selected pairs of adjacent walls, and including integral latching means for releasably latching selected pairs of adjacent walls.

The invention also includes a method of trapping carpenter bees using a baitless structure of the type described above. An affidavit of record presents data showing the effectiveness of this method in trapping carpenter bees.

6. ISSUES

The issues in this appeal are as follows:

1. Whether claims 1, 2 and 5 are anticipated under 35 U.S.C. § 102(b) by Ritchey U.S. Patent No. 5,493,997.
2. Whether claim 3 is unpatentable under 35 U.S.C. § 103(a) over Ritchey and Schneidmiller U.S. Patent 4,551,941.
3. Whether claim 4 is anticipated under 35 U.S.C. § 102(b) by Ritchey U.S. Patent No. 5,493,997.
4. Whether claim 6 is unpatentable under 35 U.S.C. § 103(a) over Ritchey and Rimback U.S. Patent 5,685,109.
5. Whether claim 7 is unpatentable under 35 U.S.C. § 103(a) over Ritchey.
6. Whether claims 8, 11 and 12 are unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.
7. Whether claim 9 is unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.
8. Whether claim 10 is unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.
9. Whether claim 13 is unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.
10. Whether claims 14 and 17-19 are unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

11. Whether claim 15 is unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

12. Whether claim 16 is unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

13. Whether claim 20 is unpatentable under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

7. GROUPING OF CLAIMS

Claims 1, 2 and 5 stand or fall together.

Claims 8, 11 and 12 stand or fall together.

Claims 14 and 17-19 stand or fall together.

Each of the other claims, 3, 4, 6, 7, 9, 10, 13, 15, 16 and 20, stands or falls by itself, and not together with any other claim.

8. ARGUMENT

Claims 1, 2 and 5

Claims 1, 2 and 5 are rejected under 35 U.S.C. § 102(b) over Ritchey U.S. Patent No. 5,493,997.

The independent claim 1 is directed to a carpenter bee trap that includes a housing that contains “no bait” and having a hole “about the same size as holes normally made by carpenter bees,” which applicant’s specification teaches to be less than about 1/2 inch. Ritchey describes a bird house that would not be suitable for use as a carpenter bee trap. The only specific teaching by Ritchey with respect to the size of the hole is that a typical size range is “from one to six inches in diameter.” This hole would be too large to satisfy the requirements of the present applicant's invention, and would not achieve the results described in the affidavit submitted by the applicant, describing the surprisingly large number of carpenter bees trapped by applicant’s claimed structure. Thus, the Ritchey patent clearly fails to anticipate applicant’s claim 1, as well as its dependent claims 2 and 5. The rejection of claims 1, 2 and 5 under § 102, therefore, is clearly unsupported and should be reversed.

Claim 3

Claim 3 is rejected under 35 U.S.C. § 103(a) over Ritchey and Schneidmiller U.S. Patent 4,551,941.

Claim 3 is dependent on claim 1, which distinguishes over Ritchey in the manner discussed above. Claim 3 adds requirements that “the exterior surface of said solid wall around said hole has a light color,” and that “the walls of said housing are opaque so that said hole appears dark from outside the housing.” Schneidmiller is relied upon to show an insect trap having a light-colored exterior and opaque walls. Schneidmiller’s trap is designed specifically for wasps, and the particular characteristics of wasps as described in the Schneidmiller patent. These characteristics include the tendency of a wasp to fly in an upward direction and toward a light source. Because of Schneidmiller’s desire to take advantage of these characteristics to trap wasps, the structure that he uses is actually diametrically opposed to the requirements of applicant’s carpenter bee trap as defined by claim 3. Applicant’s claim 3 requires that the walls of the housing be “opaque so that said hole appears dark from outside the housing,” which is in sharp contrast to Schneidmiller, who deliberately designs his trap with a light-transmitting wall surrounding the entry hole at the top of the cone 13. Schneidmiller’s light-transmitting wall satisfies his objective of providing a light source, not a dark hole, to attract the wasps:

Upper screen portion 46 defines a plurality of spaced orifices
that are small enough to prevent the passage of a wasp therethrough,
but large enough to allow passage of substantial light

In addition, the body portion of Schneidmiller’s trap is also formed of a transparent plastic (col.2, ll.1-2) to illuminate the light-transmitting wall of his cone. Thus, it can be seen that Schneidmiller’s design criteria are the exact opposite of applicant’s: Schneidmiller wants an illuminated hole to attract wasps, whereas Applicant wants a dark hole to attract carpenter bees.

Moreover, there is no explanation whatever in the final rejection as to why it would have been obvious to one of ordinary skill in this art to combine any features of Schneidmiller’s insect trap with the bird house shown by Ritchey. It is clear that the only basis for such an unusual combination are the teachings of the present applicant in the present application, and the hindsight application of those teachings in an attempt to combine two completely unrelated references.

Thus, the rejection of claim 3 should be reversed for several fundamental reasons. First, Ritchey discloses non-analogous art and does not meet the required criteria for using a reference to reject an invention under § 103(a). Second, even assuming, *arguendo*, that Ritchey is analogous art (which it is not) and could be applied under § 103(a), the Ritchey-Schneidmiller combination nonetheless fails because no *prima facie* case of obviousness has been established. For example, the Examiner failed to properly consider applicant’s invention as a whole, including the problem

applicant's invention solves, in combining Ritchey and Schneidmiller. In addition, the Examiner failed to identify a persuasive suggestion to combine the teachings of Ritchey and Schneidmiller and instead improperly used knowledge from applicant's invention to make the Ritchey-Schneidmiller combination.

The law is clear that two criteria exist for determining whether a prior art reference is analogous. First, if the prior art reference is from the same field of endeavor as the claimed invention, regardless of the problem addressed, then it is analogous art. *Ex parte Maruyama* (Appendix 7), 2001 WL 1918556, *2 (Bd. Pat. App. & Inter. 2001), (*quoting In re Clay*, 966 F.2d 656, 658-59, 23 U.S.P.Q.2d 1058, 1060 (Fed. Cir. 1992) and *citing In re Deminski*, 796 F.2d 436, 442, 230 U.S.P.Q. 313, 315 (Fed. Cir. 1986) and *In re Wood*, 599 F.2d 1032, 1036, 202 U.S.P.Q. 171, 174 (C.C.P.A. 1979)). A prior art reference and the claimed invention are within the same field of endeavor if they have essentially the same function and structure. *Deminski*, 796 F.2d at 442, 230 U.S.P.Q. at 315.

Second, if the prior art reference is not from the same field of endeavor as the claimed invention, but the prior reference is "reasonably pertinent to the particular problem with which the inventor is involved," then the reference is analogous. *Maruyama*, 2001 WL 1918556 at *2, (*quoting Clay*, 966 F.2d at 658-59, 23 U.S.P.Q.2d at 1060, *citing Deminski*, 796 F.2d at 442, 230 U.S.P.Q. at 315 and *Wood*, 599 F.2d at 1036, 202 U.S.P.Q. at 174). A prior reference is "reasonably pertinent if, even though it may be in a different field of endeavor" than that of the claimed invention, "it logically would have commended itself to an inventor's attention in considering his problem because of the matter with which it deals." *Ex parte Gaetke* (Appendix 8), 2001 WL 1918508, *3 (Bd. Pat. App. & Inter. 2001), (*quoting Clay*, 966 F.2d at 659, 23 U.S.P.Q.2d at 1061). If a prior art reference has the "same purpose as the claimed invention, the reference relates to the same problem, and that fact supports use of that reference in an obviousness rejection." *Clay*, 966 F.2d at 659, 23 U.S.P.Q.2d at 1061.

In order for an Examiner to rely on a reference as a basis for rejection of an applicant's claim, the reference "*must* either be in the field of the applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1445 (Fed. Cir. 1992), emphasis added, (*citing Deminski*, 796 F.2d at 442, 230 U.S.P.Q. at 315).

Ritchey is clearly non-analogous under both tests for analogous art. Ritchey is neither in the field of applicant's endeavor nor reasonably pertinent to the problems with which applicant was concerned. Birdhouses are designed to make it easy for birds to enter and exit, while insect traps are designed to encourage entry and prevent exit of insects, and the habits of different insects vary widely among the different species of insects. Thus, Ritchey cannot be used to reject applicant's claims under § 103(a), and the Examiner has not presented a *prima facie* case of obviousness. See *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1445 (Fed. Cir. 1992), (citing *In re Deminski*, 796 F.2d 436, 442, 230 U.S.P.Q. 313, 315 (Fed. Cir. 1986)).

Even assuming, *arguendo*, that Ritchey is analogous art (which it is not) and could be applied under § 103(a), the Ritchey-Schneidmiller combination fails for numerous additional reasons. For example, the Examiner failed to consider applicant's invention as a whole, including the problem it solves, in combining Ritchey and Schneidmiller. Moreover, the Examiner failed to identify a persuasive suggestion to combine the teachings of Ritchey and Schneidmiller and instead improperly used knowledge from applicant's invention to make the Ritchey-Schneidmiller combination.

"[I]dentification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention." *In re Kotzab*, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1316 (Fed. Cir. 2000), (citing *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457 (Fed. Cir. 1998)). "When a rejection depends on a combination of prior art references, there must be some teaching, suggestion, or motivation to combine the references." *Rouffet*, 149 F.3d at 1355, 47 U.S.P.Q.2d at 1456, (citing *In re Geiger*, 815 F.2d 686, 688, 2 U.S.P.Q.2d 1276, 1278 (Fed. Cir. 1987)). A *prima facie* case of obviousness can *only* be set up where there is "a teaching or suggestion within the prior art, or within the general knowledge of a person of ordinary skill in the field of the invention, to look to particular sources of information, to select particular elements, and to combine them in the way they were combined by the inventor." *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); see also *In re Jones*, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988). Evidence of a suggestion, teaching, or motivation to combine "must be clear and particular." *Ex parte Maruyama*, 2001 WL 1918556, *3 (Bd. Pat. App. & Inter. 2001), (citing *C.R. Bard, Inc. v. M3 Systems Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998)).

To render the claimed invention obvious, the Examiner “must identify specifically . . . the reasons one of ordinary skill in the art would have been motivated to select the references and combine them.” *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (quoting *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459 (Fed. Cir. 1998)). Obviousness cannot “be established using hindsight or in view of the teachings or suggestions of the invention.” *Ex parte Maguire* (Appendix 9), 2002 WL 1801466, *3 (Bd. Pat. App. & Inter. 2002), (quoting *Para-Ordnance Mfg. Inc. v. SGS Importers Int’l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)). In other words, the knowledge to combine “*can not* come from the applicant’s invention itself.” *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), *emphasis added*.

Section 103(a) mandates that the “invention as a whole . . . must be considered in obviousness determinations.” *In re Wright*, 848 F.2d 1216, 1219, 6 U.S.P.Q.2d 1959, 1961 (Fed. Cir. 1988). The invention as a whole includes the “structure, its properties, and the problem it solves.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961. The determination of obviousness “requires cognizance of the properties of which structure and the problem which it solves, viewed in light of the teachings of the prior art.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961, (citing *In re Rinehart*, 531 F.2d 1048, 1054, 189 U.S.P.Q.2d 143, 149 (C.C.P.A. 1976)). The relevant question in an obviousness determination is “whether what the inventor did would have been obvious to one of ordinary skill in the art attempting to solve the problem upon which the inventor was working.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961-62, (citing *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149); *see also In re Benno*, 768 F.2d 1340, 1346, 226 U.S.P.Q. 683, 687 (Fed. Cir. 1985).

The problem addressed by the applicant here was to effectively trap carpenter bees without the use of bait. Both the Ritchey birdhouse and the Schneidmiller wasp trap deal with completely different issues, requiring completely different solutions than those encountered in trapping carpenter bees without the use of bait.

The Examiner failed to show that a person of ordinary skill, seeking to solve problems related to trapping carpenter bees without the use of bait, would reasonably be expected or motivated to look to bird houses or traps for insects that are attracted to light sources. It is, thus, clear that the Examiner failed to consider applicant’s claimed invention as a whole, including the

problem applicant's invention solves, in combining Ritchey and Schneidmiller to reject the pending claims and that no *prima facie* case of obviousness has been established. *See Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961; *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149; *Benno*, 768 F.2d at 1346, 226 U.S.P.Q. at 687.

The Examiner also failed to establish why one of ordinary skill in the art would have found it obvious to combine Ritchey and Schneidmiller to achieve the claimed invention and instead improperly used knowledge from applicant's invention to make the Ritchey-Schneidmiller combination. *See In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (*quoting In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459, (Fed. Cir. 1998)). Because no persuasive suggestion to combine the teachings of Ritchey and Schneidmiller has been presented by the Examiner, a *prima facie* case of obviousness has not been made. *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); *In re Jones*, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988).

Because of the noted differences between the issues and solutions of Ritchey and Schneidmiller, the motivation, teaching, or suggestion to make the proposed combination *must* have been impermissibly derived using hindsight or using applicant's own teachings. *See Maguire*, 2002 WL 1801466 at *3, (*quoting Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)); *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), emphasis added.

For these reasons, the Examiner failed to establish why one of ordinary skill in the art would have found it obvious to combine Ritchey and Schneidmiller and, thus, failed to establish a *prima facie* case of obviousness. *See Dembiczak*, 175 F.3d at 999, 50 U.S.P.Q.2d at 1617; *Rouffet*, 149 F.3d at 1359, 47 U.S.P.Q.2d at 1459.

Furthermore, as discussed above, the combination of Ritchey and Schneidmiller fails to yield applicant's claimed invention in any event.

Claim 4

Claim 4 is rejected under 35 U.S.C. § 102(b) over Ritchey.

Claim 4 is again dependent on claim 1, and adds the requirement that one of the walls of the housing “can be pivoted away from adjacent walls to permit the hollow interior of the housing to be opened for the removal of trapped bees.” The final rejection of claim 4 totally fails to address the limitation added by claim 4, and there is no disclosure in Ritchey that meets the language of this claim. Thus, the rejection of claim 4 under § 102 is unsupported and should be reversed.

Claim 6

Claim 6 is rejected under 35 U.S.C. § 103(a) over Ritchey and Rimback U.S. Patent No. 5,685,109.

Claim 6 is dependent on claim 1, which distinguishes over Ritchey in the manner discussed above. Claim 6 adds the requirement of a single-piece construction for the housing, with molded hinges and integral latching means. Rimback is relied upon to show such a one-piece construction, but this does not overcome the other shortcoming of Ritchey pointed out above, namely, failure to show the hole size required by applicant's claims. Thus, even a combination of Ritchey and Rimback does not yield the invention defined by applicant's claim 6.

The rejection of these claim 6 should be reversed for the same reasons discussed above in connection with claim 3. First, Ritchey is non-analogous art and does not meet the required criteria for using a reference to reject an invention under § 103(a). Second, even assuming, *arguendo*, that Ritchey is analogous art (which it is not) and could be applied under § 103(a), the Ritchey-Rimback combination nonetheless fails because no *prima facie* case of obviousness has been established. For example, the Examiner failed to properly consider applicant's invention as a whole, including the problem applicant's invention solves, in combining Ritchey and Rimback. In addition, the Examiner failed to identify a persuasive suggestion to combine the teachings of Ritchey and Rimback and instead improperly used knowledge from applicant's invention to make the Ritchey- Rimback combination.

As discussed above with respect to the rejection of claim 3, the law is clear that two criteria exist for determining whether a prior art reference is analogous. In order for an Examiner to rely on a reference as a basis for rejection of an applicant's claim, the reference “*must* either be in the field of the applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned.” *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1445 (Fed. Cir. 1992), emphasis added, (*citing Deminski*, 796 F.2d at 442, 230 U.S.P.Q. at 315).

Ritchey is clearly non-analogous under both tests for analogous art. Ritchey is neither in the field of applicant's endeavor nor reasonably pertinent to the problems with which applicant was concerned. Thus, Ritchey cannot be used to reject applicant's claims under § 103(a), and the Examiner has not presented a *prima facie* case of obviousness. See *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1445 (Fed. Cir. 1992), (citing *In re Deminski*, 796 F.2d 436, 442, 230 U.S.P.Q. 313, 315 (Fed. Cir. 1986)).

Even assuming, *arguendo*, that Ritchey is analogous art (which it is not) and could be applied under § 103(a), the Ritchey-Rimback combination fails for numerous additional reasons. For example, the Examiner failed to consider applicant's invention as a whole, including the problem it solves, in combining Ritchey and Rimback. Moreover, the Examiner failed to identify a persuasive suggestion to combine the teachings of Ritchey and Rimback and instead improperly used knowledge from applicant's invention to make the Ritchey-Rimback combination.

"[I]dentification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention." *In re Kotzab*, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1316 (Fed. Cir. 2000), (citing *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457 (Fed. Cir. 1998)). "When a rejection depends on a combination of prior art references, there must be some teaching, suggestion, or motivation to combine the references." *Rouffet*, 149 F.3d at 1355, 47 U.S.P.Q.2d at 1456, (citing *In re Geiger*, 815 F.2d 686, 688, 2 U.S.P.Q.2d 1276, 1278 (Fed. Cir. 1987)). A *prima facie* case of obviousness can *only* be set up where there is "a teaching or suggestion within the prior art, or within the general knowledge of a person of ordinary skill in the field of the invention, to look to particular sources of information, to select particular elements, and to combine them in the way they were combined by the inventor." *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); see also *In re Jones*, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988). Evidence of a suggestion, teaching, or motivation to combine "must be clear and particular." *Ex parte Maruyama*, 2001 WL 1918556, *3 (Bd. Pat. App. & Inter. 2001), (citing *C.R. Bard, Inc. v. M3 Systems Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998)).

To render the claimed invention obvious, the Examiner "must identify specifically . . . the reasons one of ordinary skill in the art would have been motivated to select the references and combine them." *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999),

abrogated on other grounds by *In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (quoting *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459 (Fed. Cir. 1998)). Obviousness cannot “be established using hindsight or in view of the teachings or suggestions of the invention.” *Ex parte Maguire* (Appendix 9), 2002 WL 1801466, *3 (Bd. Pat. App. & Inter. 2002), (quoting *Para-Ordnance Mfg. Inc. v. SGS Importers Int’l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)). In other words, the knowledge to combine “*can not* come from the applicant’s invention itself.” *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), *emphasis added*.

Section 103(a) mandates that the “invention as a whole . . . must be considered in obviousness determinations.” *In re Wright*, 848 F.2d 1216, 1219, 6 U.S.P.Q.2d 1959, 1961 (Fed. Cir. 1988). The invention as a whole includes the “structure, its properties, and the problem it solves.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961. The determination of obviousness “requires cognizance of the properties of which structure and the problem which it solves, viewed in light of the teachings of the prior art.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961, (citing *In re Rinehart*, 531 F.2d 1048, 1054, 189 U.S.P.Q.2d 143, 149 (C.C.P.A. 1976)). The relevant question in an obviousness determination is “whether what the inventor did would have been obvious to one of ordinary skill in the art attempting to solve the problem upon which the inventor was working.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961-62, (citing *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149); *see also In re Benno*, 768 F.2d 1340, 1346, 226 U.S.P.Q. 683, 687 (Fed. Cir. 1985).

The Examiner failed to properly consider applicant’s claimed invention as a whole, including the problem applicant’s invention solves, in combining Ritchey and Rimback to reject the pending claims, and, thus failed to present a *prima facie* case of obviousness. *See In re Wright*, 848 F.2d 1216, 1219, 6 U.S.P.Q.2d 1959, 1961 (Fed. Cir. 1988); *In re Rinehart*, 531 F.2d 1048, 1054, 189 U.S.P.Q.2d 143, 149 (C.C.P.A. 1976); *In re Benno*, 768 F.2d 1340, 1346, 226 U.S.P.Q. 683, 687 (Fed. Cir. 1985).

The Examiner failed to show that a person of ordinary skill, seeking to solve problems related to trapping carpenter bees without the use of bait, would reasonably be expected or motivated to look to a bird house. It is, thus, clear that the Examiner failed to consider applicant’s claimed invention as a whole, including the problem applicant’s invention solves, in combining Ritchey and Rimback to reject the pending claims and that no *prima facie* case of obviousness has

been established. See *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961; *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149; *Benno*, 768 F.2d at 1346, 226 U.S.P.Q. at 687.

The Examiner also failed to establish why one of ordinary skill in the art would have found it obvious to combine Ritchey and Rimback to achieve the claimed invention and instead improperly used knowledge from applicant's invention to make the Ritchey-Rimback combination. See *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (*quoting In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459, (Fed. Cir. 1998)). Because no persuasive suggestion to combine the teachings of Ritchey and Rimback has been presented by the Examiner, a *prima facie* case of obviousness has not been made. See *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); *In re Jones*, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988).

The Examiner summarily concluded that it would have been obvious to one skilled in the art to modify the bird house of Ritchey so as to employ a one-piece construction as taught by Rimback. Obviousness, however, requires more than such summary conclusions. See *Ex parte Maruyama*, 2001 WL 1918556, *3 (Bd. Pat. App. & Inter. 2001), (*citing C.R. Bard, Inc. v. M3 Systems Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998)); *see also In re Dembiczak*, 175 F.3d 994, 999-1000, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000).

Because of the noted differences between the issues and solutions of Ritchey and Rimback, the motivation, teaching or suggestion to make the proposed combination *must* have been impermissibly derived using hindsight or using applicant's own teachings. See *Maguire*, 2002 WL 1801466 at *3, (*quoting Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)); *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), *emphasis added*.

For these reasons, the Examiner failed to establish why one of ordinary skill in the art would have found it obvious to combine Ritchey and Rimback and, thus, failed to establish a *prima facie* case of obviousness. See *Dembiczak*, 175 F.3d at 999, 50 U.S.P.Q.2d at 1617; *Rouffet*, 149 F.3d at 1359, 47 U.S.P.Q.2d at 1459.

Furthermore, any combination of Ritchey and Rimback fails to yield applicant's claimed invention in any event.

Claim 7

Claim 7 is rejected under 35 U.S.C. 103(a) based on Ritchey alone.

This claim is dependent on claim 1, which distinguishes over Ritchey in the manner discussed above. Claim 7 adds a requirement that the hole have a size "within the range of from about 5/16 inch to 1/2 inch," which also is not shown by Ritchey. The final rejection admits that Ritchey fails to disclose the hole size required by claim 7, but nevertheless contends that applicant's hole size would have been obvious because it was merely "discovering optimum or workable ranges [that] involves only routine skill in the art." This contention in the final rejection, however, ignores the admitted fact that Ritchey's structure and applicant's structure have two entirely different purposes, as discussed in detail above. It is clearly erroneous to contend that a hole size of less than 1/2 inch is an "optimum" size for Ritchey's bird house.

Claims 8, 11 and 12

Claims 8, 11 and 12 are rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

The independent claim 8 contains all the requirements of claim 1 plus the one-piece construction and integral latching means of claim 6. Unlike the rejection of claim 6, however, the rejection of claim 8 is based on a combination of Rimback and Schneidmiller.

Claim 8 distinguishes over Rimback in several ways. First, claim 8 specifically requires a housing "containing no bait." Rimback describes an insect trap that uses bait such as "a carbohydrate, typically a sweet fruit juice and/or a protein such as meat, raw fish, cat food, or hamburger." The patent specifically states that, "The bait should be replaced every day for greatest effectiveness." Second, claim 8 requires a hole of "about the same size as holes normally made by carpenter bees," which applicant's specification teaches to be less than about 1/2 inch. Rimback's trap has two entrance holes, but he says nothing about the size of the holes.

The explanation of the rejection of claim 8 in the final rejection makes no mention of the Schneidmiller patent. In any event, the shortcomings of the Schneidmiller reference have been discussed in detail above in connection with claim 3, and thus even if Schneidmiller were combined with Rimback, the resulting combination would not yield applicant's invention as

defined by claim 8. Neither reference discloses applicant's critical hole size, and neither mentions carpenter bees.

The rejection of claims 8, 11 and 12 should be reversed for several fundamental reasons. First, Rimback discloses non-analogous art and does not meet the required criteria for using a reference to reject an invention under § 103(a). Second, even assuming, *arguendo*, that Rimback is analogous art (which it is not) and could be applied under § 103(a), the Rimback and Schneidmiller combination nonetheless fails because no *prima facie* case of obviousness has been established. For example, the Examiner failed to properly consider applicant's invention as a whole, including the problem applicant's invention solves, in combining Rimback and Schneidmiller. In addition, the Examiner failed to identify a persuasive suggestion to combine the teachings of Rimback and Schneidmiller and instead improperly used knowledge from applicant's invention to make the Rimback and Schneidmiller combination.

"[I]dentification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention." *In re Kotzab*, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1316 (Fed. Cir. 2000), (citing *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457 (Fed. Cir. 1998)). "When a rejection depends on a combination of prior art references, there must be some teaching, suggestion, or motivation to combine the references." *Rouffet*, 149 F.3d at 1355, 47 U.S.P.Q.2d at 1456, (citing *In re Geiger*, 815 F.2d 686, 688, 2 U.S.P.Q.2d 1276, 1278 (Fed. Cir. 1987)). A *prima facie* case of obviousness can *only* be set up where there is "a teaching or suggestion within the prior art, or within the general knowledge of a person of ordinary skill in the field of the invention, to look to particular sources of information, to select particular elements, and to combine them in the way they were combined by the inventor." *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); *see also In re Jones*, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988). Evidence of a suggestion, teaching, or motivation to combine "must be clear and particular." *Ex parte Maruyama*, 2001 WL 1918556, *3 (Bd. Pat. App. & Inter. 2001), (citing *C.R. Bard, Inc. v. M3 Systems Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998)).

To render the claimed invention obvious, the Examiner "must identify specifically . . . the reasons one of ordinary skill in the art would have been motivated to select the references and combine them." *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999),

abrogated on other grounds by In re Gartside, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (quoting *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459 (Fed. Cir. 1998)). Obviousness cannot “be established using hindsight or in view of the teachings or suggestions of the invention.” *Ex parte Maguire* (Appendix 9), 2002 WL 1801466, *3 (Bd. Pat. App. & Inter. 2002), (quoting *Para-Ordnance Mfg. Inc. v. SGS Importers Int’l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)). In other words, the knowledge to combine “*can not* come from the applicant’s invention itself.” *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), *emphasis added*.

Section 103(a) mandates that the “invention as a whole . . . must be considered in obviousness determinations.” *In re Wright*, 848 F.2d 1216, 1219, 6 U.S.P.Q.2d 1959, 1961 (Fed. Cir. 1988). The invention as a whole includes the “structure, its properties, and the problem it solves.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961. The determination of obviousness “requires cognizance of the properties of which structure and the problem which it solves, viewed in light of the teachings of the prior art.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961, (citing *In re Rinehart*, 531 F.2d 1048, 1054, 189 U.S.P.Q.2d 143, 149 (C.C.P.A. 1976)). The relevant question in an obviousness determination is “whether what the inventor did would have been obvious to one of ordinary skill in the art attempting to solve the problem upon which the inventor was working.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961-62, (citing *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149); *see also In re Benno*, 768 F.2d 1340, 1346, 226 U.S.P.Q. 683, 687 (Fed. Cir. 1985).

The problem addressed by the applicant here was to create a baitless trap for carpenter bees. As discussed above, both the Rimback baited trap and the Schneidmiller wasp trap deal with completely different issues requiring completely different solutions than those encountered in attempting to trap carpenter bees without the use of bait.

The Examiner failed to show that a person of ordinary skill, seeking to solve problems related to trapping carpenter bees without the use of bait, would reasonably be expected or motivated to look to either Rimback or Schneidmiller. It is, thus, clear that the Examiner failed to consider applicant’s claimed invention as a whole, including the problem applicant’s invention solves, in combining Rimback and Schneidmiller to reject the pending claims and that no *prima facie* case of obviousness has been established. *See Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at

1961; *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149; *Benno*, 768 F.2d at 1346, 226 U.S.P.Q. at 687.

The Examiner also failed to establish why one of ordinary skill in the art would have found it obvious to combine Rimback and Schneidmiller to achieve the claimed invention and instead improperly used knowledge from applicant's invention to make the Rimback-Schneidmiller combination. *See In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (*quoting In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459, (Fed. Cir. 1998)). Because no persuasive suggestion to combine the teachings of Rimback and Schneidmiller has been presented by the Examiner, a *prima facie* case of obviousness has not been made. *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); *In re Jones*, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988).

Here, the explanation of the rejection of claims 8, 11 and 12 in the final rejection makes no mention whatever of the Schneidmiller patent, and thus there is not a single word of explanation to support the rejection based on the combination of the two references. The Examiner summarily concluded that it would have been obvious to one skilled in the art to modify the baited trap of Rimback with some unidentified feature of Schneidmiller. Obviousness, however, requires more than such unsupported summary conclusions. *See Ex parte Maruyama*, 2001 WL 1918556, *3 (Bd. Pat. App. & Inter. 2001), (*citing C.R. Bard, Inc. v. M3 Systems Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998)); *see also In re Dembiczak*, 175 F.3d 994, 999-1000, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000).

Because of the noted differences between the issues and solutions of Rimback and Schneidmiller, the motivation, teaching or suggestion to make the proposed combination *must* have been impermissibly derived using hindsight or using applicant's own teachings. *See Maguire*, 2002 WL 1801466 at *3, (*quoting Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)); *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), emphasis added.

For these reasons, the Examiner failed to establish why one of ordinary skill in the art would have found it obvious to combine Rimback and Schneidmiller and, thus, failed to establish a *prima facie* case of obviousness. *See Dembiczak*, 175 F.3d at 999, 50 U.S.P.Q.2d at 1617; *Rouffet*, 149 F.3d at 1359, 47 U.S.P.Q.2d at 1459.

Furthermore, as discussed above, any combination of Rimback and Schneidmiller will fail to yield applicant's claimed invention in any event.

Claim 9

Claim 9 is rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

Claim 9 is dependent on claim 8, which distinguishes over Rimback in the manner discussed above. Claim 9 adds a requirement that the interior surface of the solid wall forming the interior edge of the hole be "substantially flat." The final rejection fails to directly address the requirement added by claim 9, alleging only that "Rimback's trap is made of plastic, which has a smooth surface" This allegation does not even address the limitation added by claim 9, which specifically requires a "substantially flat" interior surface at the interior edge of the hole. This simple flat surface distinguishes applicant's invention from the structure shown in Rimback, which has cones 40 and 42 flaring away from the interior edges of the entry holes. Schneidmiller has an even larger cone 13. Thus, the rejection of claim 9 is unsupported and should be reversed.

Claim 10

Claim 10 is rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

Claim 10 is dependent on claim 8, which distinguishes over Rimback in the manner discussed above. Claim 10 adds requirements that "the exterior surface of said solid wall around said hole has a light color," and that "the walls of said housing are opaque so that said hole appears dark from outside the housing." Schneidmiller is relied upon to show an insect trap having a light-colored exterior and opaque walls. Schneidmiller's trap is designed specifically for wasps, and the particular characteristics of wasps as described in the Schneidmiller patent. These characteristics include the tendency of a wasp to fly in an upward direction and toward a light source. Because of Schneidmiller's desire to take advantage of these characteristics to trap wasps, the structure that he uses is actually diametrically opposed to the requirements of applicant's carpenter bee trap as defined by claim 3. Applicant's claim 10 requires that the walls of the housing be "opaque so that said hole appears dark from outside the housing," which is in sharp contrast to Schneidmiller, who deliberately designs his trap with a light-transmitting wall surrounding the entry hole at the top of

the cone 13. Schneidmiller's light-transmitting wall satisfies his objective of providing a light source, not a dark hole, to attract the wasps:

Upper screen portion 46 defines a plurality of spaced orifices that are small enough to prevent the passage of a wasp therethrough, but large enough to allow passage of substantial light

In addition, the body portion of Schneidmiller's trap is also formed of a transparent plastic (col.2, ll.1-2) to illuminate the light-transmitting wall of his cone. Thus, it can be seen that Schneidmiller's design criteria are the exact opposite of applicant's: Schneidmiller wants an illuminated hole to attract wasps, whereas Applicant wants a dark hole to attract carpenter bees.

Moreover, there is no explanation whatever in the final rejection as to why it would have been obvious to one of ordinary skill in this art to combine any features of Schneidmiller's insect trap with the baited trap of Rimback. It is clear that the only basis for such a combination are the teachings of the present applicant in the present application, and the hindsight application of those teachings in an attempt to combine two completely unrelated references.

Thus, the rejection of claim 10 should be reversed for several fundamental reasons. First, Rimback discloses non-analogous art and does not meet the required criteria for using a reference to reject an invention under § 103(a). Second, even assuming, *arguendo*, that Rimback is analogous art (which it is not) and could be applied under § 103(a), the Rimback-Schneidmiller combination nonetheless fails because no *prima facie* case of obviousness has been established. For example, the Examiner failed to properly consider applicant's invention as a whole, including the problem applicant's invention solves, in combining Rimback and Schneidmiller. In addition, the Examiner failed to identify a persuasive suggestion to combine the teachings of Rimback and Schneidmiller and instead improperly used knowledge from applicant's invention to make the Rimback-Schneidmiller combination.

Because of the noted differences between the issues and solutions of Rimback and Schneidmiller, the motivation, teaching or suggestion to make the proposed combination *must* have been impermissibly derived using hindsight or using applicant's own teachings. See *Maguire*, 2002 WL 1801466 at *3, (quoting *Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)); *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), emphasis added.

For these reasons, the Examiner failed to establish why one of ordinary skill in the art would have found it obvious to combine Rimback and Schneidmiller and, thus, failed to establish a *prima facie* case of obviousness. See *Dembiczak*, 175 F.3d at 999, 50 U.S.P.Q.2d at 1617; *Rouffet*, 149 F.3d at 1359, 47 U.S.P.Q.2d at 1459.

Furthermore, as discussed above, any combination of Rimback and Schneidmiller will fail to yield applicant's claimed invention in any event.

Claim 13

Claim 13 is rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

Schneidmiller is relied upon to show an insect trap having a light-colored exterior and opaque walls. Schneidmiller's trap is designed specifically for wasps, and the particular characteristics of wasps as described in the Schneidmiller patent. These characteristics include the tendency of a wasp to fly in an upward direction and toward a light source. Because of Schneidmiller's desire to take advantage of these characteristics to trap wasps, the structure that he uses is actually diametrically opposed to the requirements of applicant's carpenter bee trap as defined by claim 3. Applicant's claim 10 requires that the walls of the housing be "opaque so that said hole appears dark from outside the housing," which is in sharp contrast to Schneidmiller, who deliberately designs his trap with a light-transmitting wall surrounding the entry hole at the top of the cone 13. Schneidmiller's light-transmitting wall satisfies his objective of providing a light source, not a dark hole, to attract the wasps:

Upper screen portion 46 defines a plurality of spaced orifices that are small enough to prevent the passage of a wasp therethrough, but large enough to allow passage of substantial light

In addition, the body portion of Schneidmiller's trap is also formed of a transparent plastic (col.2, ll.1-2) to illuminate the light-transmitting wall of his cone. Thus, it can be seen that Schneidmiller's design criteria are the exact opposite of applicant's: Schneidmiller wants an illuminated hole to attract wasps, whereas Applicant wants a dark hole to attract carpenter bees.

Moreover, there is no explanation whatever in the final rejection as to why it would have been obvious to one of ordinary skill in this art to combine any features of Schneidmiller's insect trap with the baited trap of Rimback. It is clear that the only basis for such a combination are the teachings of the present applicant in the present application, and the hindsight application of those teachings in an attempt to combine two completely unrelated references.

Thus, the rejection of claim 10 should be reversed for several fundamental reasons. First, Rimback discloses non-analogous art and does not meet the required criteria for using a reference to reject an invention under § 103(a). Second, even assuming, *arguendo*, that Rimback is analogous art (which it is not) and could be applied under § 103(a), the Rimback-Schneidmiller combination nonetheless fails because no *prima facie* case of obviousness has been established. For example, the Examiner failed to properly consider applicant's invention as a whole, including the problem applicant's invention solves, in combining Rimback and Schneidmiller. In addition, the Examiner failed to identify a persuasive suggestion to combine the teachings of Rimback and Schneidmiller and instead improperly used knowledge from applicant's invention to make the Rimback-Schneidmiller combination.

Because of the noted differences between the issues and solutions of Rimback and Schneidmiller, the motivation, teaching or suggestion to make the proposed combination *must* have been impermissibly derived using hindsight or using applicant's own teachings. *See Maguire*, 2002 WL 1801466 at *3, (quoting *Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)); *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), emphasis added.

For these reasons, the Examiner failed to establish why one of ordinary skill in the art would have found it obvious to combine Rimback and Schneidmiller and, thus, failed to establish a *prima facie* case of obviousness. *See Dembiczak*, 175 F.3d at 999, 50 U.S.P.Q.2d at 1617; *Rouffet*, 149 F.3d at 1359, 47 U.S.P.Q.2d at 1459.

Furthermore, as discussed above, any combination of Rimback and Schneidmiller will fail to yield applicant's claimed invention in any event.

Claims 14 and 17-19

Claims 14 and 17-19 are rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

The independent claim 14 is a method claim directed to the use of a baitless structure to trap carpenter bees "without the use of bait or insecticide." There is no teaching whatever in the Rimback patent that his structure might be effectively used as a trap without the use of bait, nor that it might be used to trap carpenter bees. Moreover, claim 14 has the same hole-size requirement discussed above in connection with claims 1 and 8. Thus, no matter whether Rimback

is considered alone or in combination with Schneidmiller, there will be no hole of the size required by claim 14, nor any suggestion that the structure be used as a trap for carpenter bees without the use of bait. Neither Rimback nor Schneidmiller mentions carpenter bees, and neither reference suggests that carpenter bees, or other insects for that matter, can be trapped by a simple hollow container having a hole of about the same size as holes normally made by carpenter bees.

Applicant's invention requires no bait and no insecticide, and thus is environmentally attractive, and vastly superior to the references' approaches from an environmental standpoint. And yet, applicant's trap is surprisingly effective in trapping carpenter bees in large numbers. For example, the test results of record were conducted with four traps that were about 2" deep by 8" high by 6" wide, with entry holes of 5/16", 3/8", 7/16" and 1/2", respectively.

Claim 14 distinguishes over Rimback in several ways. First, claim 14 specifically requires a housing "containing no bait." Rimback describes an insect trap that uses bait such as "a carbohydrate, typically a sweet fruit juice and/or a protein such as meat, raw fish, cat food, or hamburger." The patent specifically states that, "The bait should be replaced every day for greatest effectiveness." Second, claim 14 requires a hole of "about the same size as holes normally made by carpenter bees," which applicant's specification teaches to be less than about 1/2 inch. Rimback's trap has two entrance holes, but he says nothing about the size of the holes.

The explanation of the rejection of claims 14 and 17-19 in the final rejection makes no mention of the Schneidmiller patent. In any event, the shortcomings of the Schneidmiller reference have been discussed in detail above in connection with claim 3, and thus even if Schneidmiller were combined with Rimback, the resulting combination would not yield applicant's invention as defined by claim 8. Neither reference discloses applicant's critical hole size, and neither mentions carpenter bees.

The rejection of claims 14 and 17-19 should be reversed for several fundamental reasons. First, Rimback discloses non-analogous art and does not meet the required criteria for using a reference to reject an invention under § 103(a). Second, even assuming, *arguendo*, that Rimback is analogous art (which it is not) and could be applied under § 103(a), the Rimback and Schneidmiller combination nonetheless fails because no *prima facie* case of obviousness has been established. For example, the Examiner failed to properly consider applicant's invention as a whole, including the problem applicant's invention solves, in combining Rimback and Schneidmiller. In addition, the Examiner failed to identify a persuasive suggestion to combine the

teachings of Rimback and Schneidmiller and instead improperly used knowledge from applicant's invention to make the Rimback and Schneidmiller combination.

"[I]dentification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention." *In re Kotzab*, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1316 (Fed. Cir. 2000), (citing *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457 (Fed. Cir. 1998)). "When a rejection depends on a combination of prior art references, there must be some teaching, suggestion, or motivation to combine the references." *Rouffet*, 149 F.3d at 1355, 47 U.S.P.Q.2d at 1456, (citing *In re Geiger*, 815 F.2d 686, 688, 2 U.S.P.Q.2d 1276, 1278 (Fed. Cir. 1987)). A *prima facie* case of obviousness can *only* be set up where there is "a teaching or suggestion within the prior art, or within the general knowledge of a person of ordinary skill in the field of the invention, to look to particular sources of information, to select particular elements, and to combine them in the way they were combined by the inventor." *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); *see also In re Jones*, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941, 1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988). Evidence of a suggestion, teaching, or motivation to combine "must be clear and particular." *Ex parte Maruyama*, 2001 WL 1918556, *3 (Bd. Pat. App. & Inter. 2001), (citing *C.R. Bard, Inc. v. M3 Systems Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998)).

To render the claimed invention obvious, the Examiner "must identify specifically . . . the reasons one of ordinary skill in the art would have been motivated to select the references and combine them." *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (quoting *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459 (Fed. Cir. 1998)). Obviousness cannot "be established using hindsight or in view of the teachings or suggestions of the invention." *Ex parte Maguire* (Appendix 9), 2002 WL 1801466, *3 (Bd. Pat. App. & Inter. 2002), (quoting *Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)). In other words, the knowledge to combine "*can not* come from the applicant's invention itself." *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), *emphasis added*.

Section 103(a) mandates that the "invention as a whole . . . must be considered in obviousness determinations." *In re Wright*, 848 F.2d 1216, 1219, 6 U.S.P.Q.2d 1959, 1961 (Fed.

Cir. 1988). The invention as a whole includes the “structure, its properties, and the problem it solves.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961. The determination of obviousness “requires cognizance of the properties of which structure and the problem which it solves, viewed in light of the teachings of the prior art.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961, (citing *In re Rinehart*, 531 F.2d 1048, 1054, 189 U.S.P.Q.2d 143, 149 (C.C.P.A. 1976)). The relevant question in an obviousness determination is “whether what the inventor did would have been obvious to one of ordinary skill in the art attempting to solve the problem upon which the inventor was working.” *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961-62, (citing *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149); see also *In re Benno*, 768 F.2d 1340, 1346, 226 U.S.P.Q. 683, 687 (Fed. Cir. 1985).

The problem addressed by the applicant here was to create a baitless trap for carpenter bees. As discussed above, both the Rimback baited trap and the Schneidmiller wasp trap deal with completely different issues requiring completely different solutions than those encountered in attempting to trap carpenter bees without the use of bait.

The Examiner failed to show that a person of ordinary skill, seeking to solve problems related to trapping carpenter bees without the use of bait, would reasonably be expected or motivated to look to either Rimback or Schneidmiller. It is, thus, clear that the Examiner failed to consider applicant’s claimed invention as a whole, including the problem applicant’s invention solves, in combining Rimback and Schneidmiller to reject the pending claims and that no *prima facie* case of obviousness has been established. See *Wright*, 848 F.2d at 1219, 6 U.S.P.Q.2d at 1961; *Rinehart*, 531 F.2d at 1054, 189 U.S.P.Q.2d at 149; *Benno*, 768 F.2d at 1346, 226 U.S.P.Q. at 687.

The Examiner also failed to establish why one of ordinary skill in the art would have found it obvious to combine Rimback and Schneidmiller to achieve the claimed invention and instead improperly used knowledge from applicant’s invention to make the Rimback-Schneidmiller combination. See *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000), (quoting *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1459, (Fed. Cir. 1998)). Because no persuasive suggestion to combine the teachings of Rimback and Schneidmiller has been presented by the Examiner, a *prima facie* case of obviousness has not been made. See *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1998); *In re*

Jones, 958 F.2d 347, 351, 21 U.S.P.Q.2d 1941,1943-44 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1599 (Fed. Cir. 1988).

Here, the explanation of the rejection of claims 8, 11 and 12 in the final rejection makes no mention whatever of the Schneidmiller patent, and thus there is not a single word of explanation to support the rejection based on the combination of the two references. The Examiner summarily concluded that it would have been obvious to one skilled in the art to modify the baited trap of Rimback with some unidentified feature of Schneidmiller. Obviousness, however, requires more than such unsupported summary conclusions. *See Ex parte Maruyama*, 2001 WL 1918556, *3 (Bd. Pat. App. & Inter. 2001), (citing *C.R. Bard, Inc. v. M3 Systems Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998)); *see also In re Dembiczak*, 175 F.3d 994, 999-1000, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999), *abrogated on other grounds by In re Gartside*, 203 F.3d 1305, 53 U.S.P.Q.2d 1769 (Fed. Cir. 2000).

Because of the noted differences between the issues and solutions of Rimback and Schneidmiller, the motivation, teaching or suggestion to make the proposed combination *must* have been impermissibly derived using hindsight or using applicant's own teachings. *See Maguire*, 2002 WL 1801466 at *3, (quoting *Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)); *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), *emphasis added*.

For these reasons, the Examiner failed to establish why one of ordinary skill in the art would have found it obvious to combine Rimback and Schneidmiller and, thus, failed to establish a *prima facie* case of obviousness. *See Dembiczak*, 175 F.3d at 999, 50 U.S.P.Q.2d at 1617; *Rouffet*, 149 F.3d at 1359, 47 U.S.P.Q.2d at 1459.

Furthermore, as discussed above, any combination of Rimback and Schneidmiller will fail to yield applicant's claimed invention in any event.

Claim 15

Claim 15 is rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

Claim 15 is dependent on claim 14, which distinguishes over Rimback and Schneidmiller in the manner discussed above. Claim 15 adds a requirement that the interior surface of the solid wall forming the interior edge of the hole be "substantially flat." The explanation of the rejection of claim 15 in the final rejection never mentions Schneidmiller, and merely alleges that eliminating

the conical entry structures of the Rimback structure would merely represent an obvious "change in size." This summary conclusion is not supported by any statements in either Rimback or Schneidmiller, and thus is legally deficient for all the same reasons set forth above with respect to claim 8.

The shortcomings of the Schneidmiller reference have been discussed in detail above in connection with claim 3, and thus even if Schneidmiller were combined with Rimback, the resulting combination would not yield applicant's invention as defined by claim 15. Neither reference discloses applicant's substantially flat surface forming the interior edge of the hole, nor applicant's critical hole size, and nor the trapping of carpenter bees.

Claim 16

Claim 16 is rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller.

Claim 16 is dependent on claim 14, which distinguishes over Rimback in the manner discussed above. Claim 16 adds requirements that "the exterior surface of said solid wall around said hole has a light color," and that "the walls of said housing are opaque so that said hole appears dark from outside the housing." Schneidmiller is relied upon to show an insect trap having a light-colored exterior and opaque walls. Schneidmiller's trap is designed specifically for wasps, and the particular characteristics of wasps as described in the Schneidmiller patent. These characteristics include the tendency of a wasp to fly in an upward direction and toward a light source. Because of Schneidmiller's desire to take advantage of these characteristics to trap wasps, the structure that he uses is actually diametrically opposed to the requirements of applicant's carpenter bee trap as defined by claim 3. Applicant's claim 16 requires that the walls of the housing be "opaque so that said hole appears dark from outside the housing," which is in sharp contrast to Schneidmiller, who deliberately designs his trap with a light-transmitting wall surrounding the entry hole at the top of the cone 13. Schneidmiller's light-transmitting wall satisfies his objective of providing a light source, not a dark hole, to attract the wasps:

Upper screen portion 46 defines a plurality of spaced orifices
that are small enough to prevent the passage of a wasp therethrough,
but large enough to allow passage of substantial light

In addition, the body portion of Schneidmiller's trap is also formed of a transparent plastic (col.2, ll.1-2) to illuminate the light-transmitting wall of his cone. Thus, it can be seen that Schneidmiller's design criteria are the exact opposite of applicant's: Schneidmiller wants an illuminated hole to attract wasps, whereas Applicant wants a dark hole to attract carpenter bees.

Moreover, there is no explanation whatever in the final rejection as to why it would have been obvious to one of ordinary skill in this art to combine any features of Schneidmiller's insect trap with the baited trap of Rimback. It is clear that the only basis for such a combination are the teachings of the present applicant in the present application, and the hindsight application of those teachings in an attempt to combine two completely unrelated references.

Thus, the rejection of claim 10 should be reversed for several fundamental reasons. First, Rimback discloses non-analogous art and does not meet the required criteria for using a reference to reject an invention under § 103(a). Second, even assuming, *arguendo*, that Rimback is analogous art (which it is not) and could be applied under § 103(a), the Rimback-Schneidmiller combination nonetheless fails because no *prima facie* case of obviousness has been established. For example, the Examiner failed to properly consider applicant's invention as a whole, including the problem applicant's invention solves, in combining Rimback and Schneidmiller. In addition, the Examiner failed to identify a persuasive suggestion to combine the teachings of Rimback and Schneidmiller and instead improperly used knowledge from applicant's invention to make the Rimback-Schneidmiller combination.

Because of the noted differences between the issues and solutions of Rimback and Schneidmiller, the motivation, teaching or suggestion to make the proposed combination *must* have been impermissibly derived using hindsight or using applicant's own teachings. *See Maguire*, 2002 WL 1801466 at *3, (*quoting Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.*, 73 F.3d 1085, 1087, 37 U.S.P.Q.2d 1237, 1239 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 822 (1996)); *In re Oetiker*, 977 F.2d 1443, 1447, 24 U.S.P.Q.2d 1443, 1446 (Fed. Cir. 1992), emphasis added.

For these reasons, the Examiner failed to establish why one of ordinary skill in the art would have found it obvious to combine Rimback and Schneidmiller and, thus, failed to establish a *prima facie* case of obviousness. *See Dembiczak*, 175 F.3d at 999, 50 U.S.P.Q.2d at 1617; *Rouffet*, 149 F.3d at 1359, 47 U.S.P.Q.2d at 1459.

Furthermore, as discussed above, any combination of Rimback and Schneidmiller will fail to yield applicant's claimed invention in any event.

Claim 20

Claim 20 is rejected under 35 U.S.C. § 103(a) over Rimback and Schneidmiller. wasp to fly

Claim 20 is dependent on claim 14, which distinguishes over Rimback and Schneidmiller in the manner discussed above. Claim 20 adds a requirement that the hole have a size "within the range of from about 5/16 inch to 1/2 inch," which also is not shown by Rimback or Schneidmiller. The final rejection admits that Rimback fails to disclose the hole size required by claim 20, but nevertheless contends that applicant's hole size would have been obvious because, "It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the hole of a diameter ranging between 5/16 to 1/2 inch, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering optimum or workable ranges involves only routine skill in the art." This contention in the final rejection, however, ignores the admitted fact that Rimback's structure and applicant's structure have two entirely different purposes, and fails to even attempt to point out where or how Rimback discloses "the general conditions" of applicant's claim. Thus, the final rejection of claim 20 is unsupported and should be reversed.

III. Conclusion

For the reasons set forth above, it is respectfully submitted that the final rejections of all of applicant's claims 1-20 should be reversed.

The fee of \$160.00 required by 37 C.F.R. § 1.17(f) is enclosed herewith. The Commissioner is hereby authorized to charge deposit account No. 10-0447/52372-00002 for any additional fees inadvertently omitted which may be necessary now or during the pendency of this application, except for the issue fee.

August 11, 2003

Date

Respectfully submitted,



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Appendix of Appealed Claims 1-20

1. A carpenter bee trap comprising a housing having a hollow interior and at least one solid wall having a hole formed therein to permit carpenter bees to enter the hollow interior of the housing, said hole having about the same size as holes normally made by carpenter bees so that the hole tends to attract such bees, said housing containing no bait.

2. The carpenter bee trap of claim 1 in which the interior surface of said solid wall forming the interior edge of said hole is substantially flat.

3. The carpenter bee trap of claim 1 in which said housing has only a single hole, and the exterior surface of said solid wall around said hole has a light color, and the walls of said housing are opaque so that said hole appears dark from outside the housing.

4. The carpenter bee trap of claim 1 in which at least one of the walls of said housing can be pivoted away from adjacent walls to permit the hollow interior of the housing to be opened for the removal of trapped bees.

5. The carpenter bee trap of claim 1 in which the interior surfaces of said housing are smooth.

6. The carpenter bee trap of claim 1 which is made of a single piece of molded plastic with molded hinges connecting selected pairs of adjacent walls, and including integral latching means for releasably latching selected pairs of adjacent walls.

7. The carpenter bee trap of claim 1 in which said hole has a diameter within the range of from about 5/16 inch to 1/2 inch.

8. A carpenter bee trap comprising a housing made of a single piece of molded plastic with molded hinges connecting selected pairs of adjacent walls, and including integral latching means for releasably latching selected pairs of adjacent walls, said housing having a hollow interior and at least one solid wall having a hole formed therein to permit carpenter bees to enter

the hollow interior of the housing, said hole having about the same size as holes normally made by carpenter bees so that the hole tends to attract such bees, said housing containing no bait.

9. The carpenter bee trap of claim 8 in which the interior surface of said solid wall forming the interior edge of said hole is substantially flat.

10. The carpenter bee trap of claim 8 in which the exterior surface of said solid wall around said hole has a light color, and the walls of said housing are opaque so that said hole appears dark from outside the housing.

11. The carpenter bee trap of claim 8 in which at least one of the walls of said housing can be pivoted away from adjacent walls to permit the hollow interior of the housing to be opened for the removal of trapped bees.

12. The carpenter bee trap of claim 8 in which the interior surfaces of said housing are smooth.

13. The carpenter bee trap of claim 8 in which said hole has a diameter within the range of from about 5/16 inch to 1/2 inch.

14. A method of trapping carpenter bees without the use of bait or insecticide comprising providing a housing having a hollow interior and at least one solid wall having an exposed hole formed therein to permit carpenter bees to enter the hollow interior of the housing, said hole having about the same size as holes normally made by carpenter bees so that the hole tends to attract such bees, and said housing containing no bait, and periodically removing trapped bees from said hollow interior of said housing.

15. The method of trapping carpenter bees as set forth in claim 14 in which the interior surface of said solid wall forming the interior edge of said hole is substantially flat.

16. The method of trapping carpenter bees as set forth in claim 14 in which the exterior surface of said solid wall around said hole has a light color, and the walls of said housing are opaque so that said hole appears dark from outside the housing.

17. The method of trapping carpenter bees as set forth in claim 14 in which at least one of the walls of said housing can be pivoted away from adjacent walls to permit the hollow interior of the housing to be opened for the removal of trapped bees.

18. The method of trapping carpenter bees as set forth in claim 14 in which the interior surfaces of said housing are smooth.

19. The method of trapping carpenter bees as set forth in claim 14 which is made of a single piece of molded plastic with molded hinges connecting selected pairs of adjacent walls, and including integral latching means for releasably latching selected pairs of adjacent walls.

20. The method of trapping carpenter bees as set forth in claim 14 in which said hole has a diameter within the range of from about 5/16 inch to 1/2 inch.